ARKANSAS SUPREME COURT

No. 06-824

	Opinion Delivered **March 8, 2007**
CLAY ANTHONY FORD Appellant v. LARRY NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION Appellee	PRO SE APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY, LCV 2006-18, HON. ROBERT HOLDEN WYATT, JR., JUDGE AFFIRMED.

PER CURIAM

In 1980, Clay Anthony Ford killed an Arkansas State Trooper in Marion, Arkansas. He was convicted of capital murder by a jury and sentenced to death in 1981. This court affirmed. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3 (1982). Later, this court denied a stay of execution in *Ford v. State*, 278 Ark. 106, 644 S.W.2d 252 (1982) (per curiam), but the execution was stayed by a federal court in a proceeding initiated by appellant. A writ of habeas corpus was ultimately granted, and appellant's conviction and sentence was vacated by the federal courts. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), *aff'd sub nom*. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

Appellant was retried by the State on the capital murder charge in 1997. He was convicted of first-degree murder, currently codified as Ark. Code Ann. § 5-10-102 (Repl. 2006). The jury considered the sentencing range of ten to forty years' imprisonment, or life, and sentenced appellant to life in prison. This court affirmed. *Ford v. State*, 334 Ark. 385, 976 S.W.2d 915 (1998).

Subsequently, appellant sought postconviction relief pursuant to Ark. R. Crim. P. 37.1, which was denied. This court affirmed the denial of the petition. *Ford v. State*, CR 00-302 (Ark. Oct. 11, 2001) (per curiam).

In 2006, appellant, who is incarcerated in Lincoln County, filed in the Lincoln County Circuit Court a petition for writ of habeas corpus. The circuit court denied the petition without a hearing, and appellant, proceeding pro se, has lodged an appeal here from that order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The principal issue in a habeas corpus proceeding is whether the petitioner is detained without lawful authority. Ark. Code Ann. § 16-112-103 (Repl. 2006); *Fullerton v. McCord*, 339 Ark. 45, 2 S.W.3d 775 (1999). A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a circuit court lacked jurisdiction over the cause. *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994). It is well settled that the burden is on the petitioner in a habeas corpus petition to establish such lack of jurisdiction or facial invalidity; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. *Young v. Norris*, 365 Ark. 219, ___ S.W.3d ___ (2006) (per curiam); *Friend v. Norris*, 364 Ark. 315, ___ S.W.3d ___ (2005) (per curiam).

The petitioner must make a "showing, by affidavit or other evidence, [of] probable cause to believe" he is illegally detained. Section 16-112-103(a)(1). *See also Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991). However, a habeas-corpus proceeding does not afford a prisoner an

opportunity to retry his case and is not a substitute for direct appeal or a timely petition for postconviction relief. *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000) (per curiam).

The basis of appellant's petition for writ of habeas corpus concerned his sentencing. When appellant was originally tried for capital murder in 1981, first-degree murder, which is a lesser-included offense of capital murder, was a Class A felony. Ark. Stat. Ann. § 41-1502 (Repl. 1977).[1] At that time, Class A felonies were punishable by imprisonment for not less than five years and not more than fifty years, or life. Ark. Stat. Ann. § 41-901(1)(a) (Repl. 1977).

Act 620 of 1981 re-designated first-degree murder as a Class Y felony. 1981 Ark. Acts 620, § 8, p. 1369. The act stated that the penalty range for Class Y felonies to be not less than ten years' and not more than forty years' imprisonment, or life. Section 41-901(1)(a) (Supp. 1985), currently codified as Ark. Code Ann. § 5-4-401(a)(1) (Repl. 2006).

The penalty range for a Class A felony was also changed by the act. At the time appellant was retried in 1997, the penalty range for a Class A felony was not less than six years' and not more than 30 years' imprisonment. Section 5-4-401(a)(2) (formerly section 41-901(1)(b) (Supp. 1985)).

After the 1997 jury trial, the original judgment and commitment order filed noted that appellant was convicted of first-degree murder under section 5-10-102. The offense was designated as a Class Y felony and the jurors considered a penalty consistent with a Class Y felony. An amended judgment and commitment order filed in the trial court changed the Class Y felony designation to a Class A felony designation for the charge of first-degree murder. The applicable statute was still noted as section 5-10-102.

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[1]Although this section was amended in 1981, the substantive law in effect at the time of the crime in 1980 applies to this matter.

On appeal, appellant argues that the jury was apprised of the wrong penalty range for first-degree murder in his 1997 trial, and he was prejudiced as a result. He claims that the amended judgment and commitment order is facially invalid, and that the trial court lacked the jurisdiction or authority to sentence him under a statute that did not exist, in that section 5-10-102 is not a Class A felony. Finally, appellant contends that the trial court erred in dismissing his petition for writ of habeas corpus.

Appellant's first point on appeal is whether the trial court issued a facially invalid amended judgment and commitment order when appellant was retried in 1997. While appellant couches his argument in terms of facial invalidity of the amended judgment and commitment order, the gravamen of his complaint lies in the sentencing range considered and imposed by the jury. In his argument, he asks this court to "modify his sentence to the maximum number of years pursuant to Arkansas Statute Annotated [§] 41-901(a), (50 years), or in the alternative[,] reverse and remand his case to the trial court for re-sentencing under the proper statutory sentencing provisions, and within the proper statutory sentencing range."

Here, appellant failed to meet his burden to show that the trial court lacked jurisdiction over this matter. He does not claim, nor show, that the trial court did not have either personal jurisdiction over appellant or subject-matter jurisdiction over the criminal matter before the court. Also, appellant specifically sought from this court a remand to the trial court for resentencing as an alternative redress, thus obviating any claim regarding lack of jurisdiction.

Further, appellant failed to establish that the amended judgment and commitment order was invalid on its face. The sentence appellant received, life imprisonment, was within the sentencing range of both a 1981 Class A felony and a 1997 Class Y felony. Thus, appellant's sentence of life

imprisonment was neither illegal nor unauthorized. *See, e.g.*, *Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990); *Young v. State*, 287 Ark. 361, 699 S.W.2d 398 (1985) (per curiam).

More importantly, a petition for writ of habeas corpus is fundamentally the improper remedy for appellant's allegations. If the jury had been incorrectly instructed as to the pertinent penalty range to be considered, a direct appeal or petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 would have been the appropriate remedy to correct such a matter.

A petition under Rule 37.1 is filed in the trial court seeking to correct an error made there. *Cothrine v. State*, 322 Ark. 112, 907 S.W.2d 134 (1995) (per curiam). Here, appellant is not asking the trial judge who rendered the sentence to correct it; instead, he is asking a third-party court to direct the sentencing judge to modify the sentence. This is an improper use for a petition for writ of habeas corpus. *Compare Taylor*, *supra*.

Finally, the errors contained on the amended judgment and commitment order amount to mere clerical errors. *See Carter v. Norris*, 367 Ark. 360, ___ S.W.3d ___ (2006) (per curiam). Clerical errors cannot be the basis for a petition for writ of habeas corpus. *Id.*

As appellant failed to meet his burden of proof by showing entitlement to a petition for writ of habeas corpus, there was no basis to issue the writ. *Young*, *supra*. We cannot say that the trial court erred when it rejected this argument in appellant's petition.

Appellant's next point on is appeal is whether the trial court had jurisdiction or authority to cite a statute on appellant's amended judgment and commitment order that did not exist in the Arkansas Code. As noted above, stating that section 5-10-102 was a Class A felony amounted to a mere clerical error, rather than a mistake of constitutional proportions. Moreover, appellant has failed to sustain his burden of proof to show that the trial court did not have jurisdiction over this

matter or authority to issue the amended judgment and commitment order. Appellant has cited no authority in support of his claim. We have frequently stated that we will not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003).

Appellant's final argument on appeal is whether the trial court erred in dismissing appellant's petition for writ of habeas corpus. Additionally, appellant alleges that he suffered prejudice as a result of the sentence he received.

In support of his contention that he was prejudiced by the alleged sentencing error, appellant's petition had affidavits attached thereto purportedly from three jurors in his 1997 trial. Each of them maintained that had they been given a wider sentence range of a term of years, they would not have sentenced appellant to life in prison. Thus, the inability of the jury to sentence appellant from forty-one to fifty years' imprisonment caused the jurors to opt for life imprisonment. The jurors stated in their affidavits that they had concerns about appellant being able to be paroled in a short amount of time.

The affidavits must be disregarded as violative of Ark. R. Evid. 606(b). That rule states, in pertinent part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to asset [assent] to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received[.]

This issue also relies upon the affirmative resolution of the first point on appeal as a

condition precedent. As noted above, appellant failed to prove entitlement to the issuance of a writ of habeas corpus under the first point on appeal. By failing to show that the amended judgment and commitment order was facially invalid, he likewise failed to prove that the trial court erred in denying his petition for writ of habeas corpus.

Affirmed.